UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

RAMALLO BROS. PRINTING, INC., Plaintiff, v. EL DÍA, INC., et al. Defendants.	Civil No. 06-1187 (JAF)

OPINION AND ORDER

Plaintiff, Ramallo Bros. Printing, Inc., brings the present action against Defendants El Día, Inc., Editorial Primera Hora, Inc., Advanced Graphic Printing, Inc. ("AGP"), and Carlos Nido for alleged violations of the First Amendment, U.S. CONST. amend. I; the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV; sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1,2 (2006); and several antitrust laws of Puerto Rico, 10 L.P.R.A. §§ 258, 260, 268 (2005). Docket Document Nos. 1, 15, 16. Plaintiff seeks treble damages for lost profits and injunctive relief enjoining Defendants from (1) making inclusion of corporate advertising supplements in Defendants' newspapers contingent on an advertiser's use of AGP's printing services to produce the supplements; and (2) discriminating against Plaintiff by requiring it to comply with this policy. See Docket Document Nos. 1, 15, 16. Defendants have moved to dismiss Plaintiff's claims. Docket Document No. 20. For the reasons stated

below, the court grants Defendants' motion to dismiss Plaintiff's claims with prejudice.

I.

Factual and Procedural Summary

We derive the following factual summary from Plaintiff's initial Verified Complaint and its two Supplemental Complaints. See Docket Document Nos. 1, 15, 16. As we must, we assume all of Plaintiff's allegations to be true, and we make all reasonable inferences in its favor. Alternative Energy, Inc. v. St. Paul Fire and Marine Ins., Co., 267 F.3d 30, 36 (1st Cir. 2001).

Plaintiff is a commercial printer that prints, among other things, corporate supplements. Defendants El Día and Editorial Primera Hora own and publish daily newspapers in Puerto Rico that contain corporate supplements. El Día owns and prints El Nuevo Día, the leading newspaper in Puerto Rico based on paid circulation and revenues, and also prints Primera Hora, a newspaper owned by Defendant Editorial Primera Hora. El Día requires all customers whose corporate supplements are included in El Nuevo Día and Primera Hora to have their supplements printed by AGP, a commercial printing company that competes with Plaintiff and other commercial printers ("Defendants' corporate supplement printing policy").

Plaintiff first challenged Defendants' corporate supplement printing policy in 2002. See Ramallo Bros. Printing, Inc. v. El Día,

Inc. (Ramallo I), 392 F. Supp. 2d 118 (D.P.R. 2005). Corporate supplements are a subset of commercial supplements, which are included in Defendants' newspapers. Id. at 124. In general, commercial supplements contain both editorial content and display advertising by multiple sponsors; however, corporate supplements have a more specific function in that they usually "focus on a featured business and usually celebrate that business' anniversary or some other special event." Id. Corporate supplements "constitute a negligible portion of the advertising and commercial printing business in Puerto Rico" as is illustrated by the fact that, "[f]rom 1999 to 2003, El Nuevo Día had about 5,000 commercial inserts, but only 134 corporate supplements." Id. Corporate supplements are similar to other sections of the newspaper in that they: (1) are produced and printed entirely in-house by AGP; (2) contain editorial material and advertising; and (3) are paid for by the newspaper from sponsors' advertising revenues. Id. at 136.

On June 3, 2005, we entered summary judgement in favor of Defendants upon finding that: (1) Plaintiff failed to show that Defendants' corporate supplement printing policy violated federal antitrust law; and, moreover, (2) Defendants' "right to control the editorial content and preparation of corporate supplements is . . . protected by the First Amendment." Id. at 137 (explaining that potential advertisers cannot force a newspaper to print their

advertisements, nor can they require it to use an outside printer rather than an affiliated company).

On February 17, 2006, less than a year after Ramallo I was decided, Plaintiff filed the current action. Plaintiff sued after Defendant Carlos Nido informed Plaintiff that neither El Nuevo Día nor Primera Hora would insert the supplement that Plaintiff had created to commemorate its fortieth anniversary in the commercial printing business unless Plaintiff agreed to have AGP print it. In its initial complaint, Plaintiff sought a Temporary Restraining Order and other injunctive relief based on Defendants' alleged First Amendment and Equal Protection violations. Docket Document No. 1. Defendants moved to dismiss the complaint, asserting that Plaintiff's claims were barred by res judicata, and, alternatively, arguing that Plaintiff failed to state a claim because no state action was alleged and because an injunction ordering Defendants to publish Plaintiff's corporate supplement on Plaintiff's terms would violate Defendants' First Amendment rights. Docket Document Nos. 8, 14. Plaintiff opposed, Docket Document Nos. 11, 17, and supplemented its complaint twice, alleging violations of the Sherman Act and Puerto Rico antitrust laws, and seeking treble damages. Docket Document Nos. 15, 16. Defendants moved to dismiss this second set of claims on similar grounds, arguing that they are barred by res judicata, collateral estoppel, the First Amendment, and because they fail to state a claim

under the Sherman Act. Docket Document No. 20. Plaintiff opposed shortly thereafter, Docket Document No. 22, and Defendants replied. Docket Document No. 24.

II.

Motion to Dismiss Standard

While res judicata is ordinarily pleaded as an affirmative defense, FED. R. CIV. P. 8(c), it is fully within the discretion of the district court to permit it to be raised by motion. Diaz-Buxo v. Trias Monge, 593 F.2d 153, 154 (1st Cir. 1979); see also In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 16 (1st Cir. 2003).

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an action against him based solely on the pleadings for the plaintiff's "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In assessing a motion to dismiss, "we accept as true the factual averments of the complaint and draw all reasonable inferences therefrom in the plaintiffs' favor." Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61, 62 (1st Cir. 2004). We then determine whether the plaintiff has stated a claim under which relief can be granted.

We note that a plaintiff must only satisfy the simple pleading requirements of Federal Rule of Civil Procedure 8(a) in order to survive a motion to dismiss. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51, 52-53

(1st Cir. 2003); DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55-56 (1st Cir. 1999). A plaintiff need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2), and need only give the respondent fair notice of the nature of the claim and petitioner's basis for it. Swierkiewicz, 534 U.S. at 512-515. "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Id. at 514 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

III.

Analysis

Plaintiff seeks injunctive and monetary relief under the First Amendment, the Equal Protection Clause, the Sherman Act, and Puerto Rico antitrust laws, asserting that Defendants' requirement that Plaintiff's corporate supplement be printed by AGP amounts to a violation of these laws. Docket Documents Nos. 1, 15, 16. Defendants move to dismiss Plaintiff's claims, asserting that (1) the claims are barred by res judicata and collateral estoppel based on the final judgment in Ramallo I; and, alternatively, (2) an injunction forcing Defendants to publish Plaintiff's corporate supplement would violate their First Amendment rights;

(3) Plaintiff's constitutional claims fail based on the absence of state action; and (4) its statutory claims fail to meet the required elements of a tying arrangement or an essential facility claim under sections 1 and 2 of the Sherman Act. Docket Document No. 20, 24. Because we find that res judicata and collateral estoppel apply, we will limit our discussion to Defendants' first set of arguments.

A. Res Judicata

"Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were . . . raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980). It is well-established that "a cause of action need not be a clone of the earlier cause of action" for claim preclusion to apply. Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 38 (1st Cir. 1998). Indeed, claims that "could have been raised" in the previous action but were not, are similarly barred. Allen, 449 U.S. at 94.

For claim preclusion to apply, the following three elements must be met: (1) sufficient identity between the parties in the earlier and later suits; (2) a final judgment on the merits in the earlier action; and (3) sufficient identity between the causes of action asserted in the two actions. Porn v. Nat'l Grange Mut. Ins. Co., 93 F.3d 31, 34 (1st Cir. 1996). Because there is no dispute regarding the first two elements, we move to the last element, which requires

us to determine whether the claims asserted in the current lawsuit are sufficiently identical to those asserted in the previous lawsuit.

A comparison of Plaintiff's current complaint with its complaint in Ramallo I reveals that the factual underpinning for both cases is materially identical. Compare Docket Documents Nos. 1, 15, 16, with Ramallo I, No. 02-2400, Docket Document No. 1. Plaintiff alleges in both complaints that Defendants' corporate supplement printing policy is intended to foreclose competition in the printing market, and that it denied Plaintiff and other commercial printers the ability to compete on equal terms in the printing market. Id.

Indeed, the only difference between the factual allegations in these two cases is that Ramallo I focused on the effect that Defendants' policy had on Plaintiff's ability to print supplements for third parties, whereas Plaintiff's current claims challenge the application of Defendants' policy to a corporate supplement that Plaintiff recently printed for itself, rather than a third party. Compare Docket Documents Nos. 1, 15, 16, 22, with Ramallo I, No. 02-2400, Docket Document No. 1.

Plaintiff relies on Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322 (1955), to argue that, although both lawsuits involve essentially the same course of alleged antitrust conduct, res judicata does not apply because its second lawsuit is predicated on facts that post-date the judgment in the first suit; namely, Defendants' recent

rejection of Plaintiff's own corporate supplement.[1] Docket Document No. 22. However, Plaintiff's reliance on Lawlor is misplaced. Res judicata applies to a subsequent antitrust lawsuit that attacks a continuing course of allegedly wrongful conduct unless: (1) the plaintiff alleges new antitrust violations that are different in kind from those present in the former action, or (2) there has been a substantial change in the scope of the defendants' alleged monopoly. See Lawlor, 349 U.S. at 328. The new antitrust violations must be based on "new and distinctive incidents," Havercombe v. Dep't of Educ., 250 F.3d 1, 6 (1st Cir. 2001), that are "legally significant." Waldman v. Village of Kiryas Joel, 207 F.3d 105, 113 (2nd Cir. 2000). Plaintiff's new claims fail to meet this standard.

1. Lawlor

In Lawlor, the plaintiff had previously filed an antitrust suit against three motion picture producers and their exclusive licensee for the manufacture and distribution of advertising materials. 349

[1] Plaintiff, for the first time in its third brief, advances an additional reason why its second lawsuit should not be precluded. Docket Document No. 22. It asserts that Ramallo I focused on the legality of Defendants' printing policy regarding corporate supplements, but the supplement that is the focus of the current lawsuit is not technically a corporate supplement at all as it more closely resembles a regular shopper insert. Id. The court will not consider this argument because Plaintiff's complaint, which was supplemented twice, and its previous two briefs, clearly state that this case is about corporate supplements, and Plaintiff cannot, at the eleventh hour, recharacterize its supplement as a different type of insert. See Docket Document Nos. 1, 11, 15-17.

U.S. at 324-25. The first case was settled after the defendants agreed to provide a sub-license to the plaintiffs and, as such, the court did not make any findings of law or fact. Id. The court found that, although the second lawsuit "involved essentially the same course of wrongful conduct" as the previously settled lawsuit, it was not barred because it alleged the following new antitrust violations and changes in the scope of the monopoly: (a) the conspiracy was perpetuated after the settlement agreement had been reached; (b) the licensee tried to destroy the plaintiff's business by making slow and erratic deliveries; (c) the licensee used tie-in sales and other means of exploiting its monopoly power; and (d) five new producers joined the conspiracy. Id. at 327-28.

In contrast to the situation in Lawlor, Plaintiff has not alleged any legally significant facts that constitute a new antitrust violation. Defendants' corporate supplement policy has not changed since Ramallo I; customers must still have their corporate supplements printed by AGP and this policy continues to be applied to all customers equally. Compare Docket Document No. 15 (policy applies to all customers), with Ramallo I, No. 02-2400, Docket Document No. 1 (same). The fact that Defendants' policy is now being applied to a supplement that Plaintiff created for itself, rather than for a third party, does not change the legal analysis that we conducted in Ramallo I, see 392 F. Supp. 2d at 136-37, and Plaintiff has failed to advance any arguments to the contrary. See Docket

Document No. 15. In Ramallo I, after exhaustive discovery that lasted for over a year, we concluded that Plaintiffs failed to make out the elements of a tying claim, which are: (1) evidence of an anti-competitive effect on the market for the tied product; (2) proof that the corporate supplements and AGP's printing services are separate products, including the existence of a separate demand for the printing of corporate supplements; and (3) a showing that featured businesses were forced into purchasing printing from AGP even though they either did not want to get this service from AGP, or might have preferred to purchase it elsewhere on different terms. 392 F. Supp. 2d at 136-37. Because none of these elements turn on which corporate entity is ultimately featured in the corporate supplement, Plaintiff's new allegations are rendered immaterial. See id.; see also Rose v. Town of Harwich, 778 F.2d 77, 82 (1st Cir. 1985) (refusing to apply Lawlor because plaintiff "has given [the court] no reason to believe that the legality of the town's actions depends on anything that has happened since the [trial] court dismissed his original suit").

Lawlor is also inapposite because Plaintiff has not alleged that the scope of Defendants' monopoly has been enlarged. Compare Docket Document No. 15 (stating that "[together,] El Nuevo Día (73%) and Primera Hora (2%) control approximately 75% of the delivery market"), with Ramallo I, No. 02-2400, Docket Document No. 1 (same). Plaintiff's only reference to a possible change in the alleged

monopoly was in its final brief, in which it proclaimed that "Defendants took additional steps to target more of Ramallo's clients, offering them 'Group Contracts' that illegally tie several services provided by Defendants into one single package." Docket Document No. 22. However, we will not reach this point. Plaintiff not only raises this alleged market change for the first time in its third brief, but, more importantly, does so in a perfunctory manner that fails to explain how this alleged change relates to Plaintiff's current tying claim regarding corporate supplements. See Docket Document Nos. 1, 11, 15-17, 22. In this Circuit, "it is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." Hernandez v. Smith Kline Beecham Pharm., No. 02-2750, 2005 U.S. Dist. LEXIS 27995, at *17 (D.P.R. Oct. 31, 2005) (quoting United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)); see also United States v. Figueroa-Encarnacion, 343 F.3d 23, 30 (1st Cir. 2003).

Ultimately, Lawlor cannot apply because Plaintiff has not alleged any "broadening of [Defendants'] pattern of conduct." See Walsh v. Int'l Longshoremen's Ass'n, 630 F.2d 864, 873 (1st Cir. 1980) (expressing "serious doubt" that Lawlor applied to plaintiff's claims even though the allegations post-dated the previous lawsuit because plaintiff did not allege any significant changes in the defendants' conduct). Thus, Plaintiff's argument fails.

2. Plaintiff's New Legal Theories

Plaintiff further argues that res judicata does not apply because it has alleged new legal theories that were not raised in Ramallo I. Docket Document No. 22. This is the first time that Plaintiff has advanced constitutional claims under the First and Fourteenth Amendments, as well as an "essential facility" claim under sections 1 and 2 of the Sherman Act. See Docket Document Nos. 1, 15, 16. However, Plaintiff's argument fails in light of the cardinal rule that a litigant cannot avoid the effects of res judicata by splitting its claim into various suits, based on different legal theories. See Maher v. GSI Lumonics, Inc., 433 F.3d 123, 126 (1st Cir. 2005). Accordingly, we conclude that res judicata precludes Plaintiff's current claims.

B. Collateral Estoppel

Alternatively, even if res judicata does not apply,[2] collateral estoppel bars Plaintiff's claims. As the First Circuit explained, "[t]he principle of collateral estoppel, or issue preclusion, . . . bars relitigation of any factual or legal issue that was actually decided in previous litigation between the parties, whether on the same or a different claim." Keystone Shipping Co. v. New England

[2] The First Circuit has stated that it is somewhat hesitant to apply res judicata to cases involving ongoing wrongful conduct. See Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 1, 2 (1st Cir. 1983) (noting ambiguity surrounding the application of res judicata to situations of continuous wrongful conduct, and preferring instead to apply collateral estoppel).

Power Co., 109 F.3d 46, 51 (1st Cir. 1997) (internal quotations omitted). For collateral estoppel to apply, the issue must have been: (1) raised in a previous lawsuit involving the same parties; (2)"actually litigated"; (3) "determined by a valid and binding final judgment"; and (4) "essential to the judgment." Id.

Defendants correctly argue that each of these elements is met in the instant case. In Ramallo I, Plaintiff challenged the legality of Defendants' corporate supplement printing policy and the issue was fully litigated. See 392 F. Supp. 2d at 136-37. We entered summary judgment in Defendants' favor, finding that Plaintiff failed to satisfy the elements of a tying claim. Id. at 128, 136-37. As such, the determination of the legality of Defendants' policy was essential to the judgment. Id. at 137.

Plaintiff asserts that it is not relitigating the legality of the Defendants' corporate supplement printing policy; rather, Plaintiff is challenging the specific application of Defendants' policy to a supplement that Plaintiff recently printed to commemorate its fortieth anniversary in the commercial printing business. Docket Document No. 22. However, as previously stated, this new fact - Defendants' rejection of Plaintiff's own supplement - is not legally significant. See Ramallo I, 392 F. Supp. 2d at 136-37. Plaintiff's current claims are nothing more than a second challenge to Defendants' overall corporate supplement printing policy. See Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 1, 2 (1st Cir.

1983) (finding that collateral estoppel applied to the second suit even though the new facts post-dated the allegations in the first suit because the new facts were not materially different). Moreover, as with res judicata, collateral estoppel still applies, although Plaintiff has advanced several new legal theories challenging Defendants' corporate supplement printing policy. Pignons, 701 F.2d at 2 (explaining that new legal theories cannot be used to circumvent collateral estoppel because "one opportunity to litigate an issue fully and fairly is enough"); see also Allen v. McCurry, 449 U.S. 90, 94 (1980) ("[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.")

Accordingly, we find that Plaintiff's current claims are barred by collateral estoppel as well.

C. Rule 11 Sanctions

Rule 11, subdivision (b), states:

> By presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . . is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances . . . [that] it is not being presented for any improper purpose . . . [and that] the claims . . . therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.

FED. R. CIV. P. 11(b). Attorneys, law firms, or parties that violate Rule 11 may face sanctions. FED. R. CIV. P. 11(c). A motion for sanctions must be filed "separately from other motions or requests and shall describe the specific conduct alleged to violate [the rule]." FED. R. CIV. P. 11(c)(1)(A). In addition, Rule 11 contains a safe harbor provision that requires movants to first serve the opposing counsel or party with the motion for sanctions, and only file such motion with the court if, "within 21 days after service of the motion . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Id.

Although Defendants may have a valid claim for sanctions,[3] they failed to file an appropriate motion in accordance with the procedures specified in Rule 11. Instead of serving Plaintiff with a separate motion and then filing it twenty-one days later with the court, Defendants merely inserted their request for sanctions in a brief. See Docket Document No. 20. Because Defendants failed to comply with the safe harbor provision in Rule 11, we deny their request for sanctions. See Esso Standard Oil Co. v. Rodriquez Perez, No. 01-2012, 2005 U.S. Dist. LEXIS 818, at *33 (D.P.R. Jan. 20, 2005) ("[Defendants'] failure to comply with the safe harbor provision

[3] See McLaughlin v. Bradlee, 602 F. Supp. 1412, 1417 (D.D.C. 1985) ("It is especially appropriate to impose sanctions in situations where the doctrines of res judicata and collateral estoppel plainly preclude relitigation of the suit.").

alone justifies denial of the motion for sanctions."); see also Martins v. Charles Hayden Goodwill Inn Sch., No. 94-11769, 1997 U.S. Dist. LEXIS 22618, at *10-11 (D. Mass. July 14, 1997)(same).

IV.

Conclusion

In accordance with the foregoing, we **GRANT** Defendants' motion, Docket Document No. 20, and **DISMISS WITH PREJUDICE** Plaintiffs' complaint in its entirety for failure to state a claim, pursuant to FED. R. CIV. P. 12(b)(6). In addition, Defendants' request for Rule 11 sanctions, including attorneys' fees, Docket Document No. 20, is **DENIED**. Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 28th day of August, 2006.

S/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U. S. District Judge